Ahmad Zulfendi bin Anuar v Mohd Shahril bin Abdul Rahman

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO A-04(NCVC)(W)-246–05 OF 2021
MOHD NAZLAN JCA
16 JUNE 2022

Tort — Road accident — Appeal against quantum and liability — Contributory negligence — Appellant had no driving licence, road tax and insurance policy against third party risks — Whether contributory negligence or additional liability ought to fasten on appellant that suffered injuries in motor vehicle accident caused by the negligence of respondent — Whether appellant ought not to be entitled to relief, in whole or in part, if at time of accident, he had no driving licence, road tax and insurance policy against third party risks

This claim for general and special damages, filed at the sessions court, was brought by the appellant who suffered injuries when the motorcycle he was riding on was involved in an accident with a motorcar driven and owned by the respondent. The sessions court apportioned liability between parties at 70% against the respondent for being responsible for the collision and 30% against the appellant, for contributory negligence. The sessions court also allowed the appellant's claim for, among others, loss of future earnings of RM192,000 and actual loss of income of RM28,333.30. Following an appeal and cross-appeal on both liability and quantum the High Court affirmed the findings on liability in part as well as revised that on quantum. Significantly, the learned judicial commissioner of the High Court ('the learned JC') decided to impose an additional 30% contributory negligence on the appellant, on account of the appellant riding without a valid driving licence, road tax and insurance at the material time. This resulted in a considerable revision in the apportionment of liability between the respondent as the tortfeasor and the appellant, from 70%:30% to 40%:60%. Both parties filed for appeal and cross-appeal again on liability and the same items on quantum.

Held:

(1) The trial judge had, correctly directed himself that liability ought to be imposed based on the version which was accepted to be more inherently probable. There were no good reasons to disturb the findings of the sessions court, later affirmed by the High Court that accepted the version of the appellant that the respondent had made a U-turn and was to blame for the ensuing accident, at liability adjudged to be at 70%, since the sessions court had also determined that the accident would not have

occurred but for the contributory negligence — at 30% liability — of the appellant who was found to have been riding his motorcycle too fast (see paras 16 & 18).

(2) The trial judge was in error when he decided to award loss of future earnings of RM192,000 in the absence of credible evidence that the appellant was actually working at the time of the accident. The High Court correctly arrived at the determination that the claim of the appellant that he was employed, and at a salary as he alleged, to have been lacking in credibility and patently insufficiently substantiated. The evidence with respect to the appellant's income was at best very sketchy and lacking in consistency such that the decision of the award of the trial court on loss of future earnings should be set aside altogether. Consequently, the appeal against the 1/3 deduction for actual loss of income would also fall. A lump sum of RM50,000 to the appellant was awarded as loss of earning capacity based on a 100% liability and interest (see paras 22 & 25–27).

(3) The court had the power to discuss and address the issue of illegality during the trial even though it was neither raised nor pleaded by either of the parties. The introduction of the issue on the implications of the non-possession of the licence, road tax and insurance at the appellate stage at the High Court was not objectionable because: (a) it was raised by the learned JC, not by an appellant; and (b) there were authorities which stated that where the issue which was not earlier raised by parties concerned illegality, the court may still consider the same if it had become aware of it during the course of the proceedings of the case. There was therefore nothing objectionable to the illegality issue being raised by the learned JC at the appeal stage at the High Court (see paras 32–34 & 37).

(4) The issue on tort liability in motor vehicle accident cases would still have very much to do with the conduct of the drivers and riders, licensed or otherwise, on the road. Driving or riding without a licence should not per se be negligent more so as the absence of licence or a violation of ss 15, 26 or 90 of the Road Transport Act 1987 ('the RTA') would subject the defaulting driver or rider to criminal proceedings under the RTA. The failure to have a driving licence, in breach of the RTA ought not to amount to an actionable negligence if there was no causal nexus between the negligence as alleged in transgressing the RTA and the collision causing the injuries sued for. The respondent's contention that the position of the appellant in this case was different because he had in fact been earlier found to have been 30% liable for contributory negligence independent of and prior to the finding on the non-holding of the licence that subsequently warranted the learned JC to have apportioned an additional 30% liability on the appellant (by reason of the absence of licence) was misconceived. There was no evidence that the breaches had

any causal connection with the accident or were somehow the proximate cause for the same. As such, the additional 30% liability apportioned by the High Court to the appellant could not stand. The apportionment as determined by the sessions court at 70% against the respondent and 30% against the appellant was restored. The RTA provisions already made it mandatory of vehicles to be covered by third party risk insurance, at the pain of criminal sanctions in the event of a transgression. Denial of a claim, in full or in part because of the non-holding of the licence, and absence of road tax and insurance was as such unwarranted. There must be a sufficient nexus of causal link between the unlawful act and the event in question to invoke the public policy exception. In this case, there appeared to be no evidence to connect the unlawful act (absence of licence and insurance) to the accident (see paras 100, 104, 106–107, 111 & 119).

(5) The non-holding of such licence should not be factored into increasing the liability of the said motorist especially given the facts of this case where his contribution towards his negligence has been assessed by the sessions court to be 30% liable. The appeal of the appellant on liability was allowed, the High Court's decision on liability was set aside and the sessions court's assessment of liability was reinstated. The High Court's decision on quantum was affirmed, the rest of the appeal of the appellant on quantum was dismissed but the award of RM50,000 to the appellant as loss of earning capacity (based on a 100% liability) and interest was ordered (see paras 127–128).

[Bahasa Malaysia summary

Tuntutan ganti rugi am dan khas ini, yang difailkan di mahkamah sesyen, telah dibawa oleh perayu yang mengalami kecederaan apabila motosikal yang ditunggangnya terlibat dalam kemalangan dengan kereta yang dipandu dan dimiliki oleh responden. Mahkamah sesyen membahagikan liabiliti antara pihak sebanyak 70% terhadap responden kerana bertanggungjawab terhadap perlanggaran dan 30% terhadap perayu, untuk kecuaian sertaan. Mahkamah sesyen juga membenarkan tuntutan perayu, antara lain, kehilangan pendapatan akan datang sebanyak RM192,000 dan kehilangan pendapatan sebenar sebanyak RM28,333.30. Berikutan rayuan dan rayuan balas mengenai liabiliti dan kuantum, Mahkamah Tinggi mengesahkan dapatan liabiliti sebahagiannya serta menyemak mengenai kuantum. Selain itu, pesuruhjaya kehakiman Mahkamah Tinggi yang bijaksana ('PK yang bijaksana') memutuskan untuk mengenakan tambahan 30% kecuaian sertaan kepada perayu, kerana perayu menunggang tanpa lesen memandu, cukai jalan dan insurans yang sah pada masa material. Ini menghasilkan semakan yang agak besar dalam pembahagian liabiliti antara responden sebagai pelaku tort dan perayu, daripada 70%:30% kepada 40%:60%. Kedua-dua pihak memfailkan

A rayuan dan rayuan balas sekali lagi atas liabiliti dan item yang sama pada kuantum.

Diputuskan:

B (1) Hakim bicara telah, dengan betul mengarahkan dirinya bahawa liabiliti harus dikenakan berdasarkan versi yang diterima lebih berkemungkinan. Tiada sebab kukuh untuk mengganggu penemuan mahkamah sesyen, kemudian disahkan oleh Mahkamah Tinggi yang menerima versi perayu bahawa responden telah membuat pusingan U dan dipersalahkan atas C kemalangan yang berlaku, dengan liabiliti yang diputuskan pada 70%, memandangkan mahkamah sesyen juga telah memutuskan bahawa kemalangan itu tidak akan berlaku tetapi kerana kecuaian sertaan — dengan liabiliti 30% — terhadap perayu yang didapati menunggang motosikalnya terlalu laju (lihat perenggan 16 & 18).

D (2) Hakim bicara telah terkhilaf apabila memutuskan untuk menganugerahkan kehilangan pendapatan akan datang sebanyak RM192,000 dengan ketiadaan keterangan yang boleh dipercayai bahawa perayu sebenarnya bekerja pada masa kemalangan itu. Mahkamah Tinggi betul pada penentuan bahawa tuntutan perayu bahawa dia bekerja, dan E pada gaji seperti yang didakwanya, telah tidak mempunyai kredibiliti dan tidak dapat dibuktikan secara nyata. Keterangan berkenaan dengan pendapatan perayu adalah samar dan kurang konsisten sehingga keputusan anugerah mahkamah bicara mengenai kehilangan pendapatan akan datang harus diketepikan sama sekali. Akibatnya, rayuan terhadap F potongan satu pertiga untuk kehilangan pendapatan sebenar juga akan gagal. Jumlah sekali gus RM50,000 kepada perayu telah diberikan sebagai kehilangan kapasiti pendapatan berdasarkan liabiliti 100% dan faedah (lihat perenggan 22 & 25–27).

G (3) Mahkamah mempunyai kuasa untuk membincangkan dan menangani isu kepenyalahan undang-undang semasa perbicaraan walaupun ia tidak dibangkitkan atau dirayu oleh mana-mana pihak. Pengenalan isu mengenai implikasi ketiadaan lesen, cukai jalan dan insurans di peringkat rayuan di Mahkamah Tinggi tidak boleh dibantah kerana: (a) ia H dibangkitkan oleh PK yang bijaksana, bukan oleh perayu; dan (b) terdapat autoriti yang menyatakan bahawa sekiranya isu yang tidak dibangkitkan sebelum ini oleh pihak-pihak berkenaan adalah kepenyalahan undang-undang, mahkamah masih boleh mempertimbangkan perkara yang sama jika ia telah menyedarinya I semasa prosiding kes itu. Oleh itu, tiada apa-apa yang dapat dibantah isu kepenyalahan undang-undang yang dibangkitkan oleh PK yang bijaksana pada peringkat rayuan di Mahkamah Tinggi (lihat perenggan 32–34 & 37).

(4) Isu mengenai liabiliti tort dalam kes kemalangan kenderaan bermotor

masih ada kaitan dengan kelakuan pemandu dan penunggang, berlesen atau sebaliknya, di jalan raya. Memandu atau menunggang tanpa lesen tidak bermaksud cuai lebih-lebih lagi kerana ketiadaan lesen atau pelanggaran ss 15, 26 atau 90 Akta Pengangkutan Jalan 1987 ('APJ') akan menyebabkan pemandu atau penunggang yang ingkar kepada prosiding jenayah di bawah RTA. Kegagalan untuk memiliki lesen memandu, yang melanggar RTA tidak sepatutnya dianggap sebagai kecuaian yang boleh diambil tindakan jika tiada hubungan sebab akibat antara kecuaian seperti yang didakwa melanggar RTA dan perlanggaran yang menyebabkan kecederaan yang didakwa. Pendapat responden bahawa kedudukan perayu dalam kes ini adalah berbeza kerana dia sebenarnya sebelum ini didapati 30% bertanggungjawab atas kecuaian sertaan bebas daripada dan sebelum penemuan mengenai ketiadaan lesen yang kemudiannya menyebabkan mengetahui PK yang bijaksana telah meletakkan liabiliti tambahan 30% ke atas perayu (atas sebab ketiadaan lesen) telah disalah anggap. Tiada keterangan bahawa pelanggaran itu mempunyai hubungan sebab akibat dengan kemalangan itu atau bagaimana menjadi punca terdekat untuk kejadian yang sama. Oleh itu, liabiliti tambahan 30% yang diletakkan oleh Mahkamah Tinggi kepada perayu tidak boleh diterima. Pembahagian seperti yang ditentukan oleh mahkamah sesyen sebanyak 70% terhadap responden dan 30% terhadap perayu telah dikembalikan. Peruntukan RTA telah pun mewajibkan kenderaan dilindungi oleh insurans risiko pihak ketiga, dengan dikenakan sekatan jenayah sekiranya berlaku pelanggaran. Penafian tuntutan, sepenuhnya atau sebahagiannya kerana tidak memegang lesen, dan ketiadaan cukai jalan dan insurans adalah tidak wajar. Mesti ada hubungan sebab akibat yang mencukupi antara perbuatan yang menyalahi undang-undang dan peristiwa yang dipersoalkan untuk menggunakan pengecualian dasar awam. Dalam kes ini, nampaknya tiada keterangan untuk menghubungkan perbuatan menyalahi undang-undang (ketiadaan lesen dan insurans) dengan kemalangan itu (lihat perenggan 100, 104, 106–107, 111 & 119).

(5) Ketiadaan lesen sedemikian tidak boleh diambil kira dalam meningkatkan liabiliti pemandu tersebut terutamanya memandangkan fakta kes ini di mana sertaan terhadap kecuaiannya telah dinilai oleh mahkamah sesyen sebagai 30% bertanggungjawab. Rayuan perayu atas liabiliti dibenarkan, keputusan Mahkamah Tinggi mengenai liabiliti telah diketepikan dan penilaian liabiliti mahkamah sesyen telah dikembalikan semula. Keputusan Mahkamah Tinggi mengenai kuantum telah disahkan, baki rayuan perayu mengenai kuantum telah ditolak tetapi pemberian RM50,000 kepada perayu sebagai kehilangan kapasiti pendapatan (berdasarkan liabiliti 100%) dan faedah telah diperintahkan (lihat perenggan 127–128).]

Cases referred to

Chu Kim Sing & Anor v Abdul Razak bin Amin [1999] 6 MLJ 433; [1999] 4 CLJ 448, HC (refd)

Chua Kim Suan (administratrix of the estate of Teoh Tek Lee, Decd) & Anor v Government Of Malaysia & Anor [1994] 1 MLJ 394; [1994] 1 CLJ 321, SC (refd)

Dinesh Kumar, J @ Dinesh, J v National Insurance Co Ltd and others [2018] (1) TN MAC 34, SC (refd)

Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1, FC (refd)

Godfrey v Cooper [1920] OJ No 93, SC (refd)

Holman v Johnson (1775) 1 Cowp 341; (1775) 98 ER 1120 (refd)

Joo Seng Trading Co v Commercial Importers and Distributors Sdn Bhd [2007] 4 MLJ 128; [2006] 2 MLRA 624, CA (refd)

Kerajaan Malaysia v Global Upline Sdn Bhd and another appeal [2017] 1 MLJ 170, CA (refd)

Lai Yew Seong v Chan Kim Sang [1987] 1 MLJ 403, SC (refd)

Lee Nyan Hon & Bros Sdn Bhd v Metro Charm Sdn Bhd [2009] 6 MLJ 1; [2009] 6 CLJ 626, CA (refd)

Liputan Simfoni Sdn Bhd v Pembangunan Orkid Desa Sdn Bhd [2019] 4 MLJ 141, FC (folld)

Maimunah bte Hassan (sebagai wakil harta pusaka Rozita bte Khamis) & Satu Lagi lwn Marimuthu s/o Samanathan & Satu Lagi [1993] 1 CLJ 119, HC (refd)

Malaysia National Insurance Sdn Bhd v Abdul Aziz bin Mohamad Daud [1979] 2 MLJ 29, FC (refd)

Merong Mahawangsa Sdn Bhd & Anor v Dato' Shazryl Eskay bin Abdullah [2015] 5 MLJ 619, FC (refd)

Muhammad Noor Redzuan bin Misran v Muhammad Amirul Hafiz bin Khairulazuin [2020] 10 MLJ 238; [2020] 5 CLJ 807, HC (not folld)

Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors [2020] 12 MLJ 67; [2020] 10 CLJ 1, FC (refd)

Noorianti Bte Zainol Abidin & Ors v Tang Lei Nge [1990] 2 MLJ 242; [1990] 1 CLJ 943, HC (refd)

Pang Mun Chung & Anor v Cheong Huey Charn [2018] 4 MLJ 594, CA (refd)

Patel v Mirza [2017] 1 All ER 191, SC (distd)

R Appavoo v R Karthik & Anor (CMA No 3041 of 2017) (unreported) (refd)

Rajesh Kumar v S Natarajan & Anor (CMA No 63 of 2021) (unreported) (refd)

Renuka & 3 Ors v Santhamani & Anor (CMA No 687 of 2021) (unreported), HC (refd)

Sharma and another v Simposh Ltd [2011] EWCA Civ 1383, CA (refd)

Singh (Sajan) v Sardara Ali [1960] AC 167, PC (refd)

Siti Rohani bte Mohd Shah & Ors v Haji Zainal bin Saifiee & Anor [2001] 5 MLJ 8; [2001] 1 CLJ 498, HC (refd)

Tay Lye Seng & Anor v Nazori bin Teh & Anor [1998] 3 MLJ 873; [1998] 3 CLJ 466, CA (refd)
Tinsley v Milligan [1994] 1 AC 340, HL (refd)
Yoon Fong Yin, sebagai wakil diri harta pesaka Yong Gun Ham (si-mati) v Fazree bin Syed Majid [2020] 1 PIR 53, HC (refd)

Legislation referred to

Civil Law Act 1956 s 28A(2)(c)(i), (2)(c)(ii)
Contracts Act 1950 s 24(e)
Criminal Justice Act 1993 [UK] s 52
Evidence Act 1950 s 114(g)
Road Transport Act 1987 ss 15, 15(1), 23(1), 26, 26(1), (2), 90, 90(1)
Real Property Gains Tax 1976
Rules of the Court of Appeal 1994 r 18, 18(2)
Stamp Act 1949

Appeal from: Civil Appeal No AA-12BNCvC-2–01 of 2020 (High Court, Ipoh)

Manoharan a/l Tevadasin (with Nik Muhammad Syafiq bin Nik Hilmi and Muhammad Wafi bin Abdullah) (Ong & Partners) for the appellant.
Kenneth George William (with Selvanayagam a/l Kailasam and Nuramni Fatira bt Mohd Nizam) (Kenneth William & Assoc) for the respondent.

Mohd Nazlan JCA:

INTRODUCTION

[1] The primary focus of this appeal is on the question whether contributory negligence or additional liability ought to fasten on a motorist who suffers injuries in a motor vehicle accident caused by the negligence of another, and whether the former ought not to be entitled to relief, in whole or in part, if at the time of the accident, he did not hold a valid licence to ride a motorcycle which also had no road tax and no policy of insurance against third party risks.

KEY BACKGROUND FACTS

[2] This claim for general and special damages, filed at the sessions court, was brought by the appellant herein, as the plaintiff at the trial court, who suffered injuries when the motorcycle he was riding on was involved in an accident with a motorcar driven and owned by the respondent (defendant) at KM 8, Jalan Changkat Jong, Teluk Intan, Perak on 15 December 2017.

[3] The sessions court apportioned liability between parties at 70% against the respondent for being responsible for the collision and 30% against the appellant, for contributory negligence. The sessions court also allowed the appellant's claim for, among others, loss of future earnings of RM192,000 (with a multiplicand of RM1,000) and actual loss of income of RM28,333.30 (after a 1/3 deduction from RM2,500).

[4] Following an appeal and cross-appeal on both liability and quantum the High Court affirmed the findings on liability in part as well as revised that on quantum.

[5] Significantly, the learned judicial commissioner of the High Court ('the learned JC') decided to impose an additional 30% contributory negligence on the appellant, on account of the appellant riding without a valid driving licence, road tax and insurance at the material time. This resulted in a considerable revision in the apportionment of liability between the respondent as the tortfeasor and the appellant, from 70%:30% to 40%:60%.

[6] The matter did not unexpectedly end there, for parties have now taken up their dispute before us, with both appealing and cross-appealing again on liability and the same items on quantum.

PRINCIPLES OF APPELLATE INTERVENTION

[7] The central feature of appellate intervention is well-established. It is to ascertain whether or not the trial court had arrived at its decision or finding correctly on the evidence and on the basis of the governing law. The Federal Court in the case of *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1 held as follows:

> [14] In our view, the Court of Appeal in citing these cases had clearly borne in mind the central feature of appellate intervention, ie to determine whether or not the trial court had arrived at its decision or finding correctly on the basis of the relevant law and/or the established evidence. In so doing, the Court of Appeal was perfectly entitled to examine the process of evaluation of the evidence by the trial court. Clearly, the phrase 'insufficient judicial appreciation of evidence' merely related to such a process. This is reflected in the Court of Appeal's restatement that a judge who was required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. The Court of Appeal further reiterated the principle central to appellate intervention, ie that a decision arrived at by a trial court without judicial appreciation of the evidence might be set aside on appeal. This is consistent with the established plainly wrong test.

[8] Thus in the case of *Kerajaan Malaysia v Global Upline Sdn Bhd and*

another appeal [2017] 1 MLJ 170 the Court of Appeal held that an appellate court will not intervene unless the trial court is shown to be plainly wrong in arriving at its conclusion and where there has been insufficient judicial appreciation of the evidence.

[9] In the leading case of *Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors* [2020] 12 MLJ 67; [2020] 10 CLJ 1 the Federal Court affirmed with unmistakable clarity that the principle on which an appellate court could interfere with findings of fact by the trial court is 'the plainly wrong test' principle.

[10] This important principle involves a number of circumstances, but must necessarily extend to situations where it can be shown that the impugned decision is vitiated with plain material errors, or where crucial evidence had been misconstrued, or where the trial judge had so manifestly not taken proper advantage of having seen and heard the witnesses or not properly analysed the entirety of the evidence before him, or where a decision was arrived at without adequate judicial appreciation of the evidence such as to make it rationally unsupportable.

[11] Above all, the Federal Court in *Ng Hoo Kui* established that the criterion that is central to appellate intervention must remain that deference to the trier of fact is still the rule and not the exception. And the plainly wrong test should not be used by the appellate court as a means to substitute the impugned decision with its own.

OUR DECISION ON THE APPEAL ON LIABILITY OF 70%:30%

[12] Based on the appeal and cross-appeal, the key issues in respect of liability are twofold — whether the apportionment of liability by the sessions court between the litigants, at 70% against the respondent and 30% against the appellant for contributory negligence ought to be disturbed by this court; and whether, as determined by the High Court, a further 30% contributory negligence imposed on the appellant on the grounds that he did not possess a valid driving licence, road tax, and insurance at the time of accident, thus making it 40% against the respondent and 60% against the appellant, ought in this appeal to be allowed to stand.

[13] In this case, liability is heavily disputed. The respondent took pains to emphasise that this is not a case where the appellant plaintiff was wholly free from blame. It is not a case where the court held the respondent fully liable. The sessions court found the appellant 30% liable for contributory negligence.

[14] The competing versions are in brief, as follows. The respondent stated that the appellant had suddenly exited out of a left junction (slip road) on his motorcycle and collided into the respondent's motorcar which was rightfully travelling straight along the main road from Kampar to Teluk Intan.

[15] The appellant, in contrast, maintained that the respondent had made a U-turn from the opposite direction at the junction (from Teluk Intan) and as a result encroached into the appellant's rightful path, when the appellant was coming out from the right junction (from Tapah to Teluk Intan) thus colliding into his motorcycle.

[16] Having examined the appeal record, on the first aspect of liability, we decided to affirm the concurrent finding of liability by the trial court and the High Court at 70%:30% in favour of the appellant. There were, in reference to the appeal records, no eye witnesses to this early morning 2am accident but given the conflicting versions, the trial judge had, based on the evidence of all the witnesses and the silent evidence such as the debris on the lane, scratch marks on the road, nature of damage to the respective vehicles, the sketch plan and the photographs produced, correctly directed himself that liability ought to be imposed based on the version which is accepted to be more inherently probable.

[17] We are mindful that this is consistent with the principle pronounced in the case of *Noorianti Bte Zainol Abidin & Ors v Tang Lei Nge* [1990] 2 MLJ 242; [1990] 1 CLJ 943, where the High Court held that the court should not approach the case on the basis of deciding which of the conflicting versions ought to be believed — but rather to evaluate which account was inherently probable or improbable.

[18] We are of the view that there are no good reasons to disturb the findings of the sessions court, later affirmed by the High Court that accepted the version of the appellant that the respondent had made a U-turn and was to blame for the ensuing accident, at liability adjudged to be at 70%, since the sessions court had also determined that the accident would not have occurred but for the contributory negligence — at 30% liability — of the appellant who was found to have been riding his motorcycle too fast.

OUR DECISION ON THE APPEAL ON QUANTUM

[19] As for quantum, the two main issues are first, whether the award for loss of future earnings for the appellant ought to be reinstated, and secondly, whether the 1/3 deduction for the calculation of the appellant's loss of actual earnings is correct in fact and in law.

[20] The respondent submitted that the High Court did not err in fact or in law in setting aside the sessions court's award for loss of future earnings. This is because the appellant failed to establish that there was a real risk, and not a mere speculation that he could not resume his former employment or that he could never find any other employment with the same pay as his previous salary.

[21] The 1/3 deduction imposed by the sessions court, and subsequently affirmed by the High Court for the award of loss of earnings and loss of future earnings is thus argued to be justified in fact and in law since the appellant did not substantiate his claim such as by tendering his bank statements to prove his earnings during the material period.

[22] Having given our most anxious consideration to the appeal record and to the submissions of parties, we cannot but agree that the trial judge was in error when he decided to award loss of future earnings of RM192,000 in the absence of credible evidence that the appellant was actually working at the time of the accident.

[23] We observed that notwithstanding the appellant's employer's testimony in court, the appellant failed to recall the name of his employer despite having him as the one and only other person working together with him; failed to properly describe the place of his employment where his evidence contradicts that of his employer's; admitted that he had never been issued any pay slips; denied the signature on the pay slips which was purported to be his as tendered; and testified that he was paid by cash and banked in parts of his salary but never produced his bank statements despite being requested to do so during the trial. There was also no EPF and SOCSO contributions made for the appellant and no income tax return for the business furnished by the appellant's employer.

[24] Evidence before the trial court could not have established that the appellant was gainfully employed at the time of the accident or was receiving earnings by his own labour or other gainful activity before he was injured as required under s 28A(2)(c)(i) and (ii) of the Civil Law Act 1956.

[25] The High Court in our view correctly arrived at the determination that the claim of the appellant that he was employed, and at a salary as he alleged, to have been lacking in credibility and patently insufficiently substantiated. The appellant could have easily adduced his bank statements but he did not. The learned JC was correct in holding that an adverse inference under s 114(g) of the Evidence Act 1950 ought to have been drawn against the appellant by the trial judge.

[26] We accordingly agree with the learned JC that the evidence with respect to the appellant's income is at best very sketchy and lacking in consistency such

A that the decision of the award of the trial court on loss of future earnings should be set aside altogether. Consequently, the appeal against the 1/3 deduction for actual loss of income would also fall.

B **[27]** There is, in respect of loss of earnings capacity, also no evidence that the appellant cannot return to normal work considering that persons with such disability and even with prosthetic legs are able to return to some semblance of normal life and work. Granted however that the appellant may need to adjust to his disability and endure some pain before returning to his new normal, we would award a lump sum of RM50,000 to the appellant as loss of earning C capacity based on a 100% liability and interest as prayed. We therefore dismiss the rest of the appeal of the appellant on quantum and affirm the decision of the High Court on quantum.

D THE APPEAL ON WHETHER THE ADDITIONAL LIABILITY OF 30% SHOULD BE IMPOSED AND FULL RELIEF DENIED, ON ACCOUNT OF ABSENCE OF LICENCE, ROAD TAX AND INSURANCE

E **[28]** The primary issue in this appeal proceeding however, as alluded to earlier, is this other aspect on liability, which is whether a claimant who does not possess the requisite driving or riding licence, road tax and insurance to cover third party risks should be held to be additionally liable, contributorily negligent and denied the right to claim compensation by reason of his infringement of the legal maxim *ex turpi causa non oritur actio.*

F *The matter was not raised by parties*

[29] The issue of not having a riding or driving licence, road tax and the absence of a motor insurance policy was one raised by the learned JC on his own motion, and the same was neither pleaded in the statement of defence of G the respondent at the sessions court nor stated in the memorandum of appeal of the respondent at the High Court. The appellant essentially asserted that this was therefore less than proper.

H **[30]** The appellant submitted that there are several cases which have established that the party appealing should not be allowed to argue a ground that was not pleaded in its memorandum of appeal, as a matter of essential justice, referring to authorities such as the decision of the Court of Appeal in *Joo Seng Trading Co v Commercial Importers and Distributors Sdn Bhd* [2007] 4 I MLJ 128; [2006] 2 MLRA 624, where Gopal Sri Ram JCA (as he then was) said:

> [4] In arguing this appeal, learned counsel raised three issues. First, he submitted the learned judge had erred in accepting as admissible, documents in a bundle that were in fact in serious dispute. When we put to counsel whether this formed a ground of

appeal, he frankly conceded that it did not. Thereupon, learned counsel for the respondent rose to object to the ground being argued as she was disadvantaged. After considering the objection, we ruled that it was not open to the appellant to argue the point as it had not been pleaded in its memorandum of appeal. This is a question not of mere procedure but of essential justice. The point had not been taken in the court below to afford the learned judge the opportunity to comment upon it. In any event, it would be grossly unfair to counsel for the respondent to have to defend the judgment of the High Court on an un-pleaded ground of appeal.

[31] We observed that for appeals to the Court of Appeal, there is also the provision that an appellant cannot submit in departure from the grounds of appeal as set out in its memorandum of appeal without complying with r 18 of the Rules of the Court of Appeal 1994, specifically r 18(2) which provides that an appellant must first seek leave to put forward other grounds not already stated in the memorandum of appeal.

[32] We are nonetheless of the view that the court has the power to discuss and address the issue of illegality during the trial even though it was neither raised nor pleaded by either of the parties. The introduction of the issue on the implications of the non-possession of the licence, road tax and insurance at the appellate stage at the High Court is not objectionable for two principal reasons.

[33] First, it was raised by the learned JC, not by an appellant. In that sense there is no departure from the relevant party's memorandum of appeal. More importantly the learned JC invited parties to submit on the matter for which lengthy submissions did ensue as a result. There was therefore no failure of natural justice as parties had been well-afforded the opportunity to submit on the same.

[34] Secondly, there are also authorities which state that where the issue which was not earlier raised by parties concerns illegality, the court may still consider the same if it has become aware of it during the course of the proceedings of the case. In the instant case, the issue of illegality is asserted to be the fact that at the time of the accident, the appellant did not possess a valid riding or driving licence, road tax and insurance, which is against the law, as enacted in the Road Transport Act 1987 ('the RTA').

[35] In particular, in the case of *Merong Mahawangsa Sdn Bhd & Anor v Dato' Shazryl Eskay bin Abdullah* [2015] 5 MLJ 619 the leave question for determination by the Federal Court was whether an agreement to provide services to influence the decision of a public decision maker to award a contract was an agreement opposed to public policy as defined under s 24(e) of the Contracts Act 1950, and was therefore void.

[36] The Federal Court answered in the affirmative. Jeffrey Tan FCJ, for the court stated:

> [26] Therefore, 'the question of illegality would not depend on pleading or procedure, or on who first might or should produce the documents. It would be a question of substance, of which, if necessary, the court would of its own motion take cognisance, and to which the court would give effect' (*Vita Food Products Inc v Unus Shipping Co Ltd (in Liquidation)* [1939] 1 All ER 513 per Lord Wright). ' ... when an allegation of illegality is made, and a suggestion is made to the court that the contract is illegal, notwithstanding the fact that the illegality is not pleaded, the court is bound to take cognisance of the fact that the contract may be illegal, and, if it is illegal, the court cannot enforce it' *(Marles v Philip Trant & Sons Ltd (Mackinnon, Third Party) (No 1)* [1953] 1 All ER 645 per Lynskey J). 'A judge is constrained to decide those issues raised by the pleadings in an action. The judge cannot decide issues not contained in the pleading because the judge has jurisdiction only to deal with those matters that the parties have chosen to bring before him in their pleadings. This rule is subject to exceptions where there is a public interest and the judge on his own initiative considers a matter of which he has become aware during the course of a case, although it is not contained in the pleadings, for example, cases of illegality or of conduct contrary to public policy' *(Swann, Evans, Ferguson and Crawshay (a firm) v Hill and another,* Court of Appeal (Civil Division) per Roch LJ, 8 March 2000).
>
> [27] Most recently, in *Les Laboratories Servier & Anor v Apotex Inc & Ors* [2014] UKSC 55, the Supreme Court of England per Lord Sumption (with whom Lord Neuberger and Lord Clarke agreed) affirmed that a judge is bound to take up the illegality defence:
>
> > The illegality defence, when it arises, arises in the public interest, irrespective of the interest or rights of the parties. It is because the public has its own interest in conduct giving rise to the illegality defence that the judge may be bound to take the point of his own motion, contrary to the ordinary principle in adversarial litigation.
>
> [34] And in *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & anor* [1995] 1 MLJ 719; ; [1995] 3 CLJ 520, the Court of Appeal per Gopal Sri Ram JCA, as he then was (VC George JCA, Abu Mansor JCA, as he then was, concurring) held that 'the justice of a case will ordinarily lie in favour of permitting a plea of illegality to be taken for the first time on appeal because it is unjust that a party who has broken the law should succeed' (see also *Mustafa bin Osman v Lee Chua & Anor* [1996] 2 MLJ 141, where Gopal Sri Ram JCA, as he then was, delivering the judgment of the court, affirmed 'that illegality need not be specifically pleaded').
>
> [35] Clearly, therefore, courts are bound at all stages to take notice of illegality, whether ex facie or which later appears, even though not pleaded, and to refuse to enforce the contract ...

[37] There is therefore nothing objectionable to the illegality issue being raised by the learned JC at the appeal stage at the High Court.

The basis for the imposition of additional liability & denial of relief

[38] The learned JC asked parties to submit on the following question:

> In a running down action, should the appellant (plaintiff) who at the time of the accident had no driving licence, no motor vehicle licence (commonly known as road tax) and no policy of insurance against third party risk be entitled to any relief from the court?

[39] In his more than 60-page judgment, the learned JC prefaced, before 'Introduction', the same said query.

[40] The learned JC, after hearing extensive submissions, affirmed the decision on liability but varied the same in that by reason of the appellant not having any insurance policy, road tax and riding or driving licence at the time of the accident, the appellant was denied his full entitlement for that 70% on the part of the respondent but instead had the same discounted by another 30%.

[41] In this appeal, the respondent naturally supported this finding, and formulated the logic that allowing the appellant his full claim is against public policy because it goes against the RTA which requires all motorists to possess valid driving licence, road tax, and hold insurance coverage. Here the appellant (as the plaintiff or claimant) met with the accident when he was riding his motorcycle without a valid licence, road tax and insurance. The respondent insisted on the application of the maxim *ex turpi causa non oritur actio* such that the appellant must come to court with clean hands.

[42] The best outcome, according to the respondent is to strike a balance between the appellant's right to claim on the one hand and considerations of public policy on the other, in that the absence of driving licence should sanction a deduction of at least a certain percentage of the appellant's claim, as had been adjudged by the High Court.

[43] In other words, it is proposed that the appellant should by reason of the absence of licence be apportioned a certain element of blame, on top of the finding that he was contributorily negligent for the collision. This was after all the basis for the finding by the learned JC who attached the additional 30% against the appellant for contributory negligence.

[44] On the other hand, the stance of the appellant on his opposition to the additional 30% for contributory negligence is straightforward enough, in that the position of the respondent is not supported by the law as established in case law authorities.

A **[45]** The thrust of the appellant's submissions in response is this. The appellant did not deny the absence of any riding licence, road tax and insurance policy at the time of the accident. The appellant even admitted to have been in breach of the statutory offence under the RTA which is punishable under the same statute. However, it was contended that commission of offences under
B the RTA per se does not in any way become proof of negligence.

[46] The appellant argued that in this tort of negligence, the question is on the duty of care of the parties on the road by examining the circumstances of
C the accident. The breach of the RTA by not possessing a valid riding licence, road tax and insurance policy at the relevant time should not therefore affect the appellant's personal injury claim for damages, as the plaintiff, against the respondent, due to the latter's negligent act.

D **[47]** Indeed, the respondent readily admitted in his submissions that there have been several case law authorities which hold that the claimant's claim should not be dismissed simply on account of the absence of a valid driving licence, road tax and insurance on his part at the material time of the accident. The respondent's point in this appeal is that the respondent is not, because of
E that reason, seeking the total dismissal of the appellant's claim. Instead the respondent contended that only certain percentage of contributory negligence ought to be deducted from the claim, such as the additional 30% liability imposed by the High Court in this case, which the respondent maintained ought therefore to be upheld.

F **[48]** In support of its position, the respondent referred to several cases from India which the respondent submitted portray the current trend in the courts of other jurisdictions which upholds the position of the finding of contributory negligent in road-traffic cases where the plaintiffs do not possess a valid driving
G licence or insurance.

[49] It was submitted before us that in the case of *R Appavoo v R Karthik & Anor* (CMA No 3041 of 2017) (unreported), the court affirmed the decision of the motor-accident claims tribunal that had allowed a reduction of 10% from
H the plaintiff's claim for contributory negligence by reason that the plaintiff did not possess valid driving licence at the time of accident. A similar approach was followed in *Rajesh Kumar v S Natarajan & Anor* (CMA No 63 of 2021) (unreported), where the absence of a valid driving licence on the part of the plaintiff translated into a ruling of 20% contributory negligence against him.

I **[50]** In *Renuka & 3 Ors v Santhamani & Anor* (CMA No 687 of 2021) (unreported) however, the original decision of the tribunal ordering 10% contributory negligence on the deceased's part for driving a vehicle without valid driving licence, was set aside by the court. In reversing the decision, the

High Court referred to the ruling of the Supreme Court in *Dinesh Kumar, J @ Dinesh, J v National Insurance Co Ltd and others* [2018] (1) TN MAC 34 (SC) (SC) which held that when there is no finding of contributory negligence on the part of the deceased, non-production of driving licence or insurance policy would be irrelevant. It was thus stated:

> ... 9 If a person drives a vehicle without a licence, he commits an offence. The same, by itself, in our opinion, may not lead to a finding of negligence as regards the accident. It has been held by the courts below that it was the driver of the mini truck who was driving rashly and negligently. It is one thing to say that the appellant was not possessing any licence but no finding of fact has been arrived at that he was driving the two-wheeler rashly and negligently. If he was not driving rashly and negligently which contributed to the accident, we fail to see as to how, only because he was not having a licence, he would be held to be guilty of contributory negligence ...
>
> 10 The matter might have been different if by reason of his rash and negligent driving, the accident had taken place ...

[51] At first blush, the case of *Dinesh Kumar* does not seem to support the position of the respondent because the decision held that the absence of a valid driving licence per se would not attach liability on the driver. But the true argument of the respondent, which is more clearly articulated in his written submissions than in his oral submission during the appeal hearing is that because the appellant in the instant case (who had no valid riding licence) had been held to have been contributorily negligent for the collision — at 30%, the fact that he had no licence is a relevant consideration that justified an additional apportion of liability, in this case, an additional 30% against the appellant.

[52] In other words, the respondent submitted that in light of the earlier finding of 30% contributory negligence based on the circumstances of the accident made by the sessions court and subsequently upheld by the High Court, the fact that the appellant in this case did not possess a valid driving licence is especially relevant and must be taken into consideration. The instant case, according to the respondent, should be distinguished from other cases where no contributory negligence was established on the plaintiff's part at all and where the defendant was held fully liable for the accident. As such, the respondent contended that High Court's decision in attaching an additional 30% contributory negligence on the appellant should therefore be upheld.

[53] The other argument of the respondent is what it described as the issue of public policy, especially on the rights of the party against the other who does not possess a valid licence or insurance coverage. Where both parties suffered injuries and loss as a result of a motor vehicle accident, but only one party has valid third party insurance and road tax, only the one without is able to claim

against the other who has, while the other has no redress and has to fork out his own money to foot medical bills and other expenses.

[54] In this case, therefore, the respondent asserted that it was fortunate that he did not sustain any injuries. Because if he had, he would not have been able to claim from the plaintiff who had no insurance policy coverage. This, the respondent maintained, went against the spirit of the RTA which makes it compulsory for all vehicles to hold third-party insurance to ensure everyone involved in road-traffic accidents would be compensated by way of insurance claims. Yet, in the instant case, so the respondent submitted, the law unfortunately only benefits one party (the appellant) while the other (the respondent) is deprived.

[55] Thus, it was further submitted that allowing the appeal on this issue would open a floodgate whereby more and more claimants would seek compensation in court despite not possessing valid driving licence, road tax and insurance coverage. This may have the effect of painting a negative perception in the public's mind that obtaining a valid road tax and insurance may not be necessary after all should they get involved in an accident.

[56] The High Court too undertook an analysis of a number of cases on the subject, and the learned JC was correct in his observation that the preponderance of authorities at the High Court level held that riding or driving without a valid licence per se is not negligent.

[57] Reference was made by the learned JC to, among others, the decision of the Court of Appeal in *Lee Nyan Hon & Bros Sdn Bhd v Metro Charm Sdn Bhd* [2009] 6 MLJ 1; [2009] 6 CLJ 626 which stated that the maxim that no court will lend its aid to a party who founds his cause of action on an immoral or illegal act is applicable to all causes of action, including claims in tort. In that case, which in fact concerned a breach of tenancy agreement, the Court of Appeal held:

> [67] In evaluating the available evidence, the plaintiff as the tenant was in clear breach of the terms of the tenancy agreement. The plaintiff had breached the express covenants of the tenancy agreement with impunity and this court will not lend its assistance to the plaintiff. It is quite apparent that the plaintiff is relying on its illegal acts in not procuring the building plan and the licence to operate the entertainment outlet in the building to advance its claim against the defendant. I have no hesitation in striking out the plaintiff's claim based on the *ex turpi causa non oritur actio* principle. It is a principle that is applicable to all causes of action including claims in tort. Beldam LJ delivering the judgment of the court in *Clunis v Camden and Islington Health Authority* [1998] QB 978, CA, at p 987 had this to say about the *ex turpi causa non oritur actio* principle:
>
> > But whether a claim brought is founded in contract or in tort, public policy only

requires the court to deny its assistance to a plaintiff seeking to enforce a cause of action if he was implicated in the illegality and in putting forward his case he seeks to rely upon the illegal acts.

[58] The High Court in its grounds of judgment however decided to apply the principles enunciated in the UK Supreme Court decision in *Patel v Mirza* [2017] 1 All ER 191 to justify its conclusion to impose the additional 30% as contributory negligence against the appellant by reason of the absence, on his part, of a valid driving licence, road tax and insurance.

Our Analysis

The applicability of *ex turpi causa non oritur* action to tortious liability

[59] The predominant issue in this appeal is the extent of the applicability of the argument on illegality, in respect of the appellant's infringement of the RTA to the claim by the appellant for compensation against the respondent arising from the accident.

[60] We should state that in respect of the requirement for a driving or riding licence, s 26(1) of the RTA provides that no person shall drive a motor vehicle of any class or description, on a road unless he is the holder of a driving licence authorising him to drive a motor vehicle of that class or description, whilst s 26(2) provides that any person who contravenes sub-s (1) shall be guilty of an offence and shall on conviction be liable to a fine of not less than RM300 and not more than RM2,000 or to imprisonment for a term not exceeding three months or to both such fine and imprisonment.

[61] As for road tax (or motor vehicle licence), the requirement is found in s 15(1) of the RTA which provides that no person shall use a motor vehicle in respect of which there is not in force a motor vehicle licence granted under the Act. Section 23(1) further states that any person who uses a motor vehicle while there is not in force such motor vehicle licence shall be guilty of an offence and shall on conviction be liable to a fine not exceeding RM2,000.

[62] And in relation to the requirement for third party insurance coverage, s 90(1) clearly states that it shall not be lawful for any person to use a motor vehicle unless there is in force in relation to the use of the motor vehicle by that person a policy of insurance or such a security in respect of third party risks. Further, under s 26(2), a person who contravenes this requirement shall be guilty of an offence and shall on conviction be liable to a fine not exceeding RM1,000 or to imprisonment for a term not exceeding three months or to both, and shall also be disqualified from holding or obtaining a driving licence for a period of twelve months from the date of the conviction.

[63] It is well-established in common law that the defence of illegality has always been long governed by the Latin maxim — *ex turpi causa non oritur actio* — no action can arise from a base cause, and this is primarily attributed to the authoritative pronouncement of Lord Mansfield in *Holman v Johnson* (1775) 1 Cowp 341; (1775) 98 ER 1120, as explained in, among others, the following passage:

> The objection, that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for, his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this; *ex dolo malo non oritur actio.* No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiffs own stating or otherwise, the cause of action appears to arise *ex turpi causa,* or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally in fault, *potior est conditio defendentis.*

[64] The case *Holman v Johnson* was factually about contractual enforcement where the court ruled that the agreement could be enforced because the seller, as claimant, had himself done nothing unlawful.

[65] Back in Malaysia, the Supreme Court had already in *Chua Kim Suan (administratrix of the estate of Teoh Tek Lee, Decd) & Anor v Government Of Malaysia & Anor* [1994] 1 MLJ 394; [1994] 1 CLJ 321 considered the question whether a claim for damages related to earnings from illegal activities should be disallowed by reason of *ex turpi causa non oritur actio* and being against public policy. Peh Swee Chin SCJ held thus:

> We have decided after most anxious consideration that any claim for loss of earnings from any illegal source should not be allowed on the ground that it is against public policy. We think that we would also follow, on this point, the decisions of *Ooi Han Sun; Burns; Lebagge and Dhlamini,* and approve the *dictum* in question in *Yaacob.* We therefore uphold the decision of the learned judge in the court below and that of the learned registrar at the first instance that the claim for that part of damages as related to earnings from the illegal operation of the taxi should be disallowed; because *ex turpi causa non oritur actio* or in other words, such claim would be against public policy. W*e would like to emphasise the timely caution of the learned Chief Justice of Singapore in Ooi's case, that the maxim has a limited application in tort. The maxim's principal role lies mainly and almost exclusively in actions on contract.* (Emphasis added.)

[66] This was followed in another case where the question again was whether the claim for loss of earnings should be disallowed since at the time of the accident, the claimant was working illegally in Singapore and his work permit had already expired. Since the earnings came from an illegal source, it was contended that the maxim *ex turpi causa non oritur actio* applied to bar the claim for loss of earnings because it was against public policy.

[67] That arose in the decision of the Court of Appeal in *Tay Lye Seng & Anor v Nazori bin Teh & Anor* [1998] 3 MLJ 873; [1998] 3 CLJ 466 which held that the claimant was not culpably responsible for the predicament that he had found himself to be such that the maxim *ex turpi causa non oritur actio* lacked moral justification.

[68] It was also held that while public policy would defeat any claim based on illegality, a balance has to be drawn based on the peculiar facts and circumstances of each case, and that significantly for present purposes, the maxim *ex turpi causa non oritur actio* has limited application in tort for the role of the maxim lies mainly and most exclusively in actions based on contract.

[69] We now offer a number of observations. First, these cases demonstrate that whilst the application of the maxim *ex turpi causa non oritur actio* means that public policy would defeat any claim which is premised on illegality, a balance must still be drawn based on the specific facts and circumstances of each case.

[70] Secondly, the application of the said maxim to cases of tortious liability is very limited. We are not aware, and neither have we been referred to any case authorities in our jurisdiction which clearly hold that the non-compliance with the said provisions under the RTA are a form of illegality in respect of which public policy would deny the claimant (wrongdoer vis a vis the RTA) from pursuing his right to claim compensation for the tortious liability of the negligent party.

Authorities hold that absence of licence does not make one negligent without more

[71] Thirdly, there is no denying that, as mentioned earlier, case law authorities are unequivocal in affirming the position that the absence of driving licence, road tax and insurance does not make a motorist negligent. On this, the appellant also referred to a number of authorities in support of his position, including from other Commonwealth jurisdictions, which reflects the position to be fairly well-entrenched, such as the decision of the Ontario Supreme Court in the case of *Godfrey v Cooper* [1920] OJ No 93 where the majority repudiated the view that an unregistered motor vehicle is an outlaw and its operation on

A the highway ought to be deemed unlawful in every aspect. Instead Middleton J for the majority held thus:

> 30. I disagree with every element of this contention. In my opinion, a mere failure to obtain a licence does not deprive the driver of any right of action he would otherwise have against any person who injures him by negligence. Nor can a defendant rely upon any breach of the provision of the statute, unless he can shew that the breach of the statute was a proximate cause of the accident ...

B

C **[72]** These decisions from other jurisdictions, including from India as highlighted by the respondent show one important point. That the principle that the absence of driving and motor vehicle licence and insurance in non-compliance with the applicable road transport legislation does not per se equate to negligence. The principle also appears to be of universal application and has long been accepted by the courts in these other countries.

D

[73] In any event in Malaysia, the jurisdiction that matters most for present purposes, we reiterate that case law authorities on the position in law concerning victims of road accidents who drive or ride without a valid licence is in our view, as so stated by the learned JC as well, pretty settled. The said driver or rider, without more, is not negligent.

E

[74] In the case of *Siti Rohani bte Mohd Shah & Ors v Haji Zainal bin Saifiee & Anor* [2001] 5 MLJ 8; [2001] 1 CLJ 498 it was held that riding or driving without a valid licence per se would not enter into the cause of an accident. Rather, it is the manner of the riding or driving and or conduct on or in relation to the road that enter into the cause of a motor accident or collision. Jeffrey Tan J (as he then was) further held:

F

> Now to answer Miss Lai, the law of course does not sanction a person without a valid licence to be riding or driving a vehicle on the road. But that person is not, as would seem to have been suggested by Miss Lai, fair game, with no rights. He is still entitled to the same duty of care expected of to be accorded to all on and adjacent to the road. For it is an underlying principle of the law of the highway that all must show mutual respect and forbearance (see *Searle v Wallbank* [1947] AC 341, p 361). The only remedy, or penalty if you like, is that prescribed in the RTA. The remedy is not an actionable wrong.

G

H

[75] A couple of years prior, in *Chu Kim Sing & Anor v Abdul Razak bin Amin* [1999] 6 MLJ 433; [1999] 4 CLJ 448 Abdul Malik Ishak J (as he then was) had stated:

I

> In my judgment, the fact that the respondent did not have a valid driving licence, and was not wearing a safety helmet and the fact that the motorcycle ridden by him was without a road tax, an insurance and was not fitted with a horn cannot in law make him negligent. There was no duty on the part of the respondent to minimise the effects or probable consequences of any injury that he may suffer, but which he

has yet to suffer, through the negligence of another. It was not foreseeable for the respondent to foresee that harm would fall on others as to make him liable for actionable negligence by riding the motorcycle while those extraneous factors were contravened by him and neither would the respondent foresee that by riding the motorcycle with these extraneous factors being contravened by him would result in harm to himself and thereby contribute to the cause of the accident.

[76] Earlier, in *Maimunah bte Hassan (sebagai wakil harta pusaka Rozita bte Khamis) & Satu Lagi lwn Marimuthu s/o Samanathan & Satu Lagi* [1993] 1 CLJ 119 the High Court had also ruled that a motor cyclist is not negligent merely because he has no valid licence, road tax and insurance.

The High Court sought to apply the principles in *Patel v Mirza* in the instant case

[77] Enter *Patel v Mirza*, the decision much relied on by the learned JC in his imposition of the additional 30% liability on the appellant for the absence of licence. In *Patel v Mirza*, the appellant appealed against an order that he return funds paid to him by the respondent pursuant to an agreement between them. The latter had handed over to the former the money to bet on a bank's share price using insider information. This agreement amounted to a conspiracy to commit the offence of insider dealing.

[78] This is thus a contract law case concerning the scope of the illegality principle relating to insider trading under s 52 of the Criminal Justice Act 1993. It is also not a tort case. In any event, the insider information did not materialise, and the appellant instead kept the money for himself. The respondent moved to recover the same, claiming breach of contract and unjust enrichment.

[79] The High Court applied the 'reliance principle' in *Tinsley v Milligan* [1994] 1 AC 340 and ruled that the respondent's claim was unenforceable because he had to rely on his own illegality to establish it. The majority in the Court of Appeal agreed, but allowed the claim by reason that the arrangement had not been executed.

[80] The Supreme Court held that the appellant should return the money on the ground that it was inappropriate to allow him to profit from his wrongdoing in participating in the illegality. The Supreme Court by a majority held that there were two policy reasons for the common law doctrine of illegality as a defence to a civil claim. The first is that a person should not be allowed to profit from his own wrongdoing, and the second is the law should be coherent, not self-defeating, and should not condone illegality.

[81] The majority in *Patel v Mirza* formulated a flexible approach in the three considerations identified by Lord Toulson to determine whether allowing a claim which is tainted by illegality would be harmful to the integrity of the legal system and contrary to the public interest, which are:

(a) the underlying purpose of the prohibition which has been transgressed, and whether that purpose will be enhanced by denying the claim;

(b) any other relevant public policies which may be affected; and

(c) whether denial of the claim would be a proportionate response to the illegality by considering various relevant factors, including the seriousness of the conduct, its centrality to the contract, whether it was intentional and whether there was marked disparity in the parties' respective culpability.

[82] In applying the three considerations expressed in *Patel v Mirza*, in respect of the first, that is whether the underlying purpose of the prohibition being transgressed will be enhanced by the denial of the claim, the learned JC viewed that a denial of the claim in whole or in part will serve the underlying purpose of ensuring only qualified drivers who have undergone a competency test to qualify for a licence and who have in force a policy of insurance against third party risks are permitted to drive.

[83] The second, on any other relevant public policy on which denial of the claim may have an impact, again such a denial was deemed by the learned JC as serving the public policy and instilling drivers and riders with a sense of responsibility, and with the mentality that laws are to be obeyed at all times. As for the third consideration of the test in respect of whether denial of the claim would be a proportionate response to the illegality, the learned JC opined in the affirmative, expressing the view that all road users with motor vehicles must all help and share in carrying the risk of damages that may befall any road user arising from their negligence and in the process assist to reduce the load of insurance premium.

[84] And as a result, in concluding, the High Court held that 'in the greater interest of the law', the liability of the plaintiff should be increased by 30%.

Whether *Patel v Mirza* should be applied or was correctly applied in this case

[85] We observed that it is true that the strictness of the illegality defence of *ex turpi causa non oritur actio* of *Holman v Johnson* has now been considerably modified by the application of the test of weighing competing policy considerations together with the element of proportionality as propounded by *Patel v Mirza.*

[86] However the conclusion arrived at by the learned JC at the High Court, in his application of *Patel v Mirza* appears to elevate and reaffirm the strictness of the illegality point. What is now clear is that based on the recent decisions of the appellate courts the law has since moved away from the long established traditional approach, in favour of the factor-based approach espoused in *Patel v Mirza.*

[87] Thus, in the case of *Pang Mun Chung & Anor v Cheong Huey Charn* [2018] 4 MLJ 594 the Court of Appeal ruled that when the defence of illegality is raised, the key consideration is the public interest in the integrity and consistency of the legal system, following the factor-based approach of *Patel v Mirza*. This is in accord with upholding the integrity and harmony of the law by achieving an equitable result based on the facts in each case.

[88] In *Pang Mun Chung* the Court of Appeal held that denying the plaintiffs the remedy of restitution would be disproportionate as the defendant would be unjustly enriched, and that the public policy of denying the defendant an unjust windfall must take precedence over any policy in favour of applying the illegality defence.

[89] A similar approach was adopted by the Federal Court in another relatively recent decision of *Liputan Simfoni Sdn Bhd v Pembangunan Orkid Desa Sdn Bhd* [2019] 4 MLJ 141. For present purposes one issue of contention was whether a sale and purchase agreement ('the SPA') executed between the parties was void for illegality, with both the High Court and the Court of Appeal holding that the SPA had the effect of evading the payment of the real property gains tax and the stamp duty.

[90] The following passages from the judgment written by Hasan Lah FCJ are most instructive:

> Having carefully considered the authorities cited by the parties, we are inclined to agree with the contention of learned counsel for the first defendant that the second SPA is not void. We agree with the view that the courts should be slow in striking down commercial contracts on the ground of illegality. The compliance with the Stamp Act 1949 and the Real Property Gains Tax 1976 are not the prerequisite for the second SPA to be enforceable. *There is no prohibition under the two Acts to preclude the first defendant from acquiring rights to the subject land. The Stamp Act 1949 provides a penalty for breach of its provisions. Similarly, under the Real Property Gains Tax Act 1976 there are penalties for breach of its provision*. In addition, it is provided that tax due and payable may be recovered by the government by civil proceeding as a debt to the government. The object of the two Acts is to raise revenue. There is therefore no sufficient nexus such as would satisfy the test laid down in *Curragh Investment Ltd. The first defendant's infringement of the two Acts therefore did not prevent it from suing on the contract which is legal.*

A [118] *In addition, we find that the test laid down by Lord Toulson in Patel that is to say, the trio considerations, is a sensible one, which we should follow. Applying the test to the facts of this case, we find that it is an overkill for the first defendant to lose the subject land for the infringement of the two Acts which is punishable by a fine upon conviction*. (Emphasis added.)

B

[91] As can be seen earlier, in applying the requisite policy considerations set out by *Patel v Mirza*, the learned JC relied considerably on the emphasis of the need for motorists to ensure compliance with the RTA, such that only qualified drivers and riders should be on the roads. However, as the learned JC himself C acknowledged, transgressions of the relevant statutory provisions concerning the need to hold a licence, to have a road tax and insurance are offences under the RTA that would subject the offenders to proceedings under criminal law.

D **[92]** The Supreme Court in *Patel v Mirza* emphasised that given that punishment for wrongdoing (in that case insider trading, here, road traffic offences) was the responsibility of the criminal courts, the civil courts, being generally concerned with determining private rights and obligations, should neither undermine the effectiveness of the criminal law nor impose additional E penalties disproportionate to the nature and seriousness of any wrongdoing.

[93] We agree that violation of traffic laws must only be dealt with under the specific laws creating the relevant offences, such as in the RTA, and the court should refrain from the temptation of imposing additional penalty in whatever F form in the civil court against the offender.

[94] We also consider it imperative to emphasise that the RTA does not contain any provisions which restrict let alone prohibit the rights of any road user from making personal injury claims by reason of the claimant breaching G the RTA, including in respect of the requirement for holding the requisite licence, road tax and insurance. The rights of a claimant are in no way automatically diminished let alone extinguished because of any failure to adhere to laws enacted under the RTA. There is therefore no justification for the finding that the claimant who suffers injuries due to the negligence of H others ought to be denied from being allowed the full relief under the law.

[95] This outcome is also consistent with the decisions mentioned earlier, notably in *Liputan Simfoni* , where the Federal Court reiterated that there is no prohibition under the Stamp Act 1949 and the Real Property Gains Tax 1976 I to preclude the relevant party from acquiring rights to the subject land under the agreement. *Patel v Mirza* also held that unless a statute provided otherwise, property could pass under a transaction that was illegal as a contract, applying cases such as *Singh (Sajan) v Sardara Ali* [1960] AC 167 and *Sharma and another v Simposh Ltd* [2011] EWCA Civ 1383.

[96] The appellant also argued that the learned JC in the instant case did not follow the decision of the Court of Appeal (unreported) which affirmed that of the High Court in *Yoon Fong Yin, sebagai wakil diri harta pesaka Yong Gun Ham (si-mati) v Fazree bin Syed Majid* [2020] 1 PIR 53. In that case, the High Court held that the magistrate had erred in his approach in relation to the issue of the plaintiff not possessing driving licence and road tax, where there was a failure to distinguish between proof of negligence and traffic offence. A traffic offender cannot be equated with a negligent person.

[97] This we agree is a valid proposition, especially if there is no evidence that because of the absence of licence, a claimant does not know how to drive a motor car or ride a motorcycle, or is not credible.

The jurisprudence on tort liability in motor vehicle accident cases is well-settled

[98] It is useful to observe that the learned JC at the High Court also agreed with another recent decision of the High Court in *Muhammad Noor Redzuan bin Misran v Muhammad Amirul Hafiz bin Khairulazuin* [2020] 10 MLJ 238; [2020] 5 CLJ 807 where it was held that full liability (an increase from the 80% liability determined by the sessions court) ought to be imposed on a road user who was involved in a road accident while driving or riding a motor vehicle without a valid licence. This is because since s 26(1) of the RTA prohibits anyone from driving a motor vehicle without a valid driving licence, the act of driving or riding without one therefore constitutes an illegal act, and it should follow that such road user does not deserve any protection of the law.

[99] In other words, the High Court in that case ruled that the law cannot protect one who has no regard for the law. The logic here is that if the appellant was not on the road because he was unlicenced or without road tax, there would not be any vehicle for the collision in the first place. Otherwise, the law would be rewarding the unlicenced driver for not complying with the law that seeks to regulate the conduct of traffic and transportation on the road, by posing a danger both to himself and above all, to other law-abiding users of the road.

[100] In our view, the issue will still have very much to do with the conduct of the drivers and riders, licenced or otherwise, on the road. Driving or riding without a licence should not per se be negligent more so as the absence of licence or a violation of ss 15, 26 or 90 of the RTA would subject the defaulting driver or rider to criminal proceedings under the RTA. But it is a relevant fact that must still be taken into account in evaluating the probabilities and credibility of the account of the accident presented in court.

[101] Take a simple example of a claimant who is riding a motorcycle in a manner and under circumstances fully in accord with traffic rules apart from not be in possession of a valid riding licence, road tax and insurance policy. A motorcar then negligently hits the rear of the motorcycle resulting in the claimant falling and suffering injuries. Should he be denied the right to claim for damages against the negligent act of the car driver merely because he does not hold a valid licence, road tax and insurance — and as such had no right to be on the roads in the first place, as reasoned by *Muhammad Noor Redzuan Misran*. The answer, we say, must be a resounding 'No'.

[102] The law in that situation requires proof and evidence of negligence either to limit such a claim, to such extent that the claimant may be liable on a certain apportionment of contributory negligence or deny the claim altogether, if he is found to be fully liable. To rule that a mere failure to have a driving licence to be negligent ignores the fundamental requirement of causal connection between an injury and the alleged negligence.

[103] We reiterate nonetheless that the fact of the absence of licence is not entirely irrelevant because whilst the absence of such licence, road tax or insurance may be proper and admissible evidence, it must be established to have been a contributing cause to the injury suffered by the claimant before it can afford a basis of liability. And after all, as was plainly stated by the Supreme Court in *Lai Yew Seong v Chan Kim Sang* [1987] 1 MLJ 403 the test of contributory negligence is based entirely on the conduct of the plaintiff in that particular accident. Further, in order to establish the defence of contributory negligence, the defendant must prove, first that the plaintiff failed to take such care as a reasonable man would take for his own safety, and secondly, that the plaintiff's failure to take care was a contributory cause of the accident. In other words, not holding a licence, road tax or insurance has nothing to do with it.

[104] As such, the failure to have a driving licence, in breach of the RTA ought not to amount to an actionable negligence if there is no causal nexus between the negligence as alleged in transgressing the RTA and the collision causing the injuries sued for. The absence of licence per se cannot be the proximate cause of the plaintiff's injuries. The absence of such a licence would be no evidence whatsoever that the driver was not a safe, capable and skilled driver.

[105] The negligence of the driver is to be evaluated and determined by the facts existing at the time of the accident, and not upon whether or not he has a driving licence, road tax and insurance policy. Liability is the cornerstone of negligence. The fault for a collision is dependent on which party failed to act responsibly and in a safe manner. As such, for a driver without a licence to be held liable, he must be found to have operated the vehicle in a careless

(negligent) fashion that resulted in the accident. In other words, the absence of licence must have played a role in the collision.

[106] Given this analysis, the respondent's contention that the position of the appellant in this case is different because he had in fact been earlier found to have been 30% liable for contributory negligence independent of and prior to the finding on the non-holding of the licence that subsequently warranted the learned JC to have apportioned an additional 30% liability on the appellant (by reason of the absence of licence) is, with respect, misconceived.

[107] The reason is manifest. That additional 30% was imposed purely because of the non-compliance with the requirements for driving licence, road tax and insurance. But there was still no evidence that these breaches have any causal connection with the accident or were somehow the proximate cause for the same. Not at all. As such, with respect to the learned JC, the additional 30% liability apportioned by the High Court to the appellant cannot stand. The appellant's appeal on this specific point is therefore allowed. We restore the apportionment as determined by the sessions court at 70% against the respondent and 30% against the appellant.

[108] The other argument of the respondent is what it described as the issue of public policy, especially on the rights of the party against the other who does not possess a valid licence or insurance coverage. Where both parties suffered injuries and loss as a result of a motor vehicle accident, but only one party has valid third party insurance and road tax, only the one without is able to claim against the other who has, while the other has no redress and has to fork out his own money to foot medical bills and other expenses. In other words, the High Court in the instant case held that since should any injury or damage be caused, the wrongdoer may not be able to pay for the same, any claimant who willfully uses a motor vehicle without insurance should not be entitled to relief should he or she suffer any accident.

[109] In this case, therefore, the respondent asserted that it was fortunate that he did not sustain any injuries. Because if he had, he would not have been able to claim from the plaintiff who had no insurance policy coverage. This, the respondent maintained, went against the spirit of the RTA which makes it compulsory for all vehicles to hold third-party insurance to ensure everyone involved in road traffic accidents would be compensated by way of insurance claims. Yet, in the instant case, so the respondent submitted, the law unfortunately only benefits one party (the appellant) while the other (the respondent) is deprived.

[110] We cannot emphasise enough that the consequences for violation of the relevant provisions are already spelt out in the legislation. An uninsured victim

A driving without licence or road tax, like the appellant herein would potentially be subject to criminal sanctions under the RTA. It cannot be said that he therefore benefitted from the accident. It also is not right to say he is allowed to profit from his wrongdoing because what he is claiming is compensation for the injuries he actually suffered due to the negligence of another, in this case, B the respondent.

[111] The learned JC in his analysis of the public policy consideration pursuant to *Patel v Mirza* considered that denial of a full claim would be a C proportionate response to the illegality, since motorists should share in carrying the risk of damages that may befall any road user arising from their negligence and in the process assist to reduce the load of insurance premium. Again, we state that the RTA provisions already made it mandatory of vehicles to be covered by third party risk insurance, at the pain of criminal sanctions in the event of a transgression. That law seeks to achieve what the High Court in this D case thought ought to be enforced, and in a circuitous fashion that impinges on established principles of tortious liability. Denial of a claim, in full or in part because of the non-holding of the licence, and absence of road tax and insurance is as such unwarranted.

E

[112] In respect of the perceived unfairness when the situation is reversed where the one without the requisite third party risk insurance coverage negligently causes the injuries and losses to another motorist, precluding altogether the ability of the latter to claim insurance coverage against the F former's insurer, this in our view is tantamount to an unnecessary conflation of issues.

[113] This is because in such a situation the defaulter or wrongdoer, in addition to being liable to punishment under the RTA would also likely to be G adjudged to be responsible for the loss, against whom the victim has the right to claim full compensation. That finding may have nothing to do with his violation of the RTA but everything to do with the negligent way he was driving. In other words, the question of whether the court should apportion additional liability against the negligent driver because of his breach of the RTA H in this situation does not arise. It is wholly irrelevant and unnecessary.

[114] It is of course true that because there is no third party insurance coverage in that situation, the victim might not get compensated for his losses from the negligent party or his insurer. This might seem unfair. Especially if assuming I there is also no first party coverage vis a vis the claimant's own insurer.

[115] But the point here is this. The respondent's argument which appears to have been endorsed by the learned JC about the purported unfairness of the situation of the inability of the victim to get compensation from third party

insurance coverage is misplaced. This reasoning was advanced in support of the apportionment of liability in the situation where the claimant is the one who infringes the RTA, to the effect that such infringement should add to the claimant's own liability for otherwise it would not be fair if the situation is reversed.

[116] But as has been amply shown, in such a reverse situation, the issue does not arise at all. The apportionment of liability by reason of violation of RTA where the negligent party is also the person in breach of the RTA is a non-issue. And at any rate, if somehow liability was still to be additionally apportioned to him, this still does not address the issue on the absence of insurance coverage to compensate the claimant — which is the very unfairness argument raised by the respondent herein. Pursuant to the policy assessment, the attempt to deny relief (and impose additional liability) is anchored on the assumption that compliance with the RTA would increase as a consequence.

[117] This we think is tenuous. That the imposition or apportionment of liability by reason of violation of the RTA would make or encourage motorists to comply with the relevant provisions under the RTA, in both situations where the person in breach is the claimant, or where he is the negligent party, is too general and simplistic. This does not and cannot justify a departure from the established body of jurisprudence on tortious liability in motor vehicle accident cases.

[118] Neither does it represent an accurate application of the principles in *Patel v Mirza*. After all, based on *Patel v Mirza*, the court should not be concerned to examine and evaluate what are said to be the relevant policies. the court ought only to identify the policies and determine whether allowing the claim would be conflicting with those policies. And if the policies appear to compete, the court should decide where the overall balance lies. We do not think this approach was entirely suited to be applied in the instant case and in any event its application by the High Court does not truly adhere to the said approach.

[119] There must, in our view, be a sufficient nexus of causal link between the unlawful act and the event in question to invoke the public policy exception. In this case, there appears to be no evidence to connect the unlawful act (absence of licence and insurance) to the accident. In *Malaysia National Insurance Sdn Bhd v Abdul Aziz bin Mohamad Daud* [1979] 2 MLJ 29, a case highlighted by the learned JC in his grounds of judgment, which concerned a claimant under an insurance policy who drove with an expired licence, the former Federal Court held that one should not profit at another person's expense from his own conscious and deliberate crime, but that motor manslaughter cases (what more

driving without licence, road tax and insurance) are not within these classes of cases.

[120] In other words, although the accident occurred at a time the driver's licence was not renewed, it was not against public policy for the insurance policy to indemnify the loss arising from the accident because road traffic cases such as manslaughter on the road by gross negligence and negligent driving are not willful and culpable crimes which render them contrary to public policy.

[121] Public policy should not therefore prevent the enforcement of an indemnity given that the act to be indemnified is one intended by law that people should insure against. Raja Azlan Shah FJ (as HRH then was) further stated:

> On the other hand the motor manslaughter cases are not within these classes of cases and public policy does not prevent the enforcement of an indemnity (see *Tinline v White Cross Insurance Association Ltd* [1921] 3 KB 327 and *James v British General Insurance Co Ltd* [1927] 2 KB 311). The reason behind it seems to be that the act to be indemnified is one intended by law that people should insure against. The logical test is whether the person seeking indemnity is guilty of a deliberate, intended and unlawful violence or threats of violence. Road traffic cases, eg, manslaughter on the road by gross negligence, negligent driving and the like are not wilful and culpable crimes which make them contrary to public policy to allow a person to be indemnified. In the circumstances, having carefully reviewed the question of public policy, I do not think it applies in this case.

CONCLUSION

[122] We summarise that on the issue of liability, we appreciate that the learned JC had considered all the cases for and against increasing liability with respect to a motorist who does not have a licence nor a road tax nor insurance. We emphasise that we are certainly not condoning in anyway the blatant breach by a motorist of such a nature.

[123] However, these breaches are, as mentioned earlier, offences under the statute and should therefore be for the enforcement agency to deal with, under the RTA, for the public prosecutor to prosecute and if convicted, for the court to impose the necessary punishment.

[124] We are of the view that the non-holding of such licence should not be factored into increasing the liability of the said motorist especially given the facts of this case where his contribution towards his negligence has been assessed by the sessions court to be 30% liable. The factors of lack of a licence or road tax or insurance do not in the circumstance of this case make the appellant more negligent or contributed much more to his negligence other

than as previously held by the sessions court to be assessed at 30%. These factors should not deny the right of the appellant from claiming relief either in whole or in part.

[125] We see no good reason to interfere with this finding and apportionment of liability. To increase the apportionment of liability by another 30% or any part thereof for that matter would be to take into account an irrelevant consideration which does not, in the circumstances of this case, affect the way the accident had happened.

[126] We appreciate the point of public policy but we cannot say that the appellant is profiting in any way from his breach of the RTA where licensing, road tax and insurance is concerned. He is merely claiming for personal injuries sustained.

[127] As such we therefore allow the appeal of the appellant on liability and set aside the High Court's decision on liability and reinstate the sessions court's assessment of liability.

[128] We also affirm the High Court's decision on quantum, dismiss the rest of the appeal of the appellant on quantum but ordered the award of RM50,000 to the appellant as loss of earning capacity (based on a 100% liability) and interest as prayed.

[129] The order of costs in the High Court is set aside and we affirm the order of costs in sessions court.

[130] As for this appeal, we award the appellant cost of RM10,000 subject to allocatur.

Order accordingly.

Reported by Nabilah Syahida Abdullah Salleh